No. 6789

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT 8

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

*Appellant,*

vs.

THE NATIONAL BANK OF TACOMA, a National Banking Association,

*Appellee.*

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division



## Brief of Appellee

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## STATEMENT OF THE CASE

For many years the appellee Bank had been advancing moneys to the American Wood Pipe Company, hereinafter referred to as the "Pipe Company," to finance its operations in the manufacture and sale of wood pipe and other similar products. (Tr. p. 70.) Many of the loans so made

were secured by assigning to the Bank invoices covering products manufactured and sold by the Pipe Company, which invoices were accompanied by bills of lading showing shipment of such products according to the terms of the invoices. (Tr. p. 73.) In the fall of 1928 Mr. Morrill, President of the Pipe Company, came to Mr. Mattison, then Vice President of the Bank, and stated that the Pipe Company was in financial difficulties so that unless they could secure advances prior to the time their products were made up and delivered to the carriers, they would be unable to finance the filling of existing orders or to take on other orders or even to continue in business. Mr. Morrill therefore requested the Bank to make advances against proceeds of orders taken but as yet unfilled. This the Bank wholly declined to do but suggested that it might consider making advances against the proceeds of such orders if it could be supplied with a bond of the Pipe Company and a satisfactory surety company guaranteeing to it (1) that there was in fact a valid and enforceable order as represented by the Pipe Company, and (2) undertaking to indemnify the Bank against any loss which it might sustain by reason of the failure to perform and fulfill such order. Mr. Morrill was positive that he could obtain bonds of that character and to the effect required and undertook to do so, and accordingly arranged with the appellant Surety Company for such bonds. (Tr. pp. 74-77, 78-80.)

Pursuant to this arrangement the Pipe Company from time to time thereafter applied to the Bank for advances against the proceeds of what were represented to be accepted, written orders, tendering to the Bank as the basis of each loan or advance so applied for an assignment of the proceeds of an order for certain wood products to be manufactured by the Pipe Company, together with the undertaking of the Pipe Company and the appellant Surety Company in the form of a bond that the Pipe Company had accepted a written order corresponding to that covered by the assignment tendered and that *such order would be fulfilled and completed according to its terms*, and further *that the Bank would be indemnified against any loss by reason of the Pipe Company's failure to carry out and complete such order.* The Bank from time to time thereafter, as such assignments and bonds were tendered to it, made advances, taking the Pipe Company's note to evidence the amount of each advance so made, but in each instance relying upon the undertakings of the Pipe Company and the appellant Surety Company in the bond contemporaneously furnished for the existence, enforceability, and performance of the order recited in the bond.

The occasion for such bonds, the particular circumstances under which that involved in this action was executed and delivered, the purpose for which the bonds were obtained by the Pipe Com-

pany, the use made of them, as well as the reliance put thereon by the Bank, were all known to the Surety Company prior to and at the time it executed said bond. (Tr. pp. 69-70. Offer of Proof, Tr. pp. 95-99.)

So far we have stated the underlying facts and circumstances in general terms. Coming to the particulars of the case on appeal, we have this situation: On January 21, 1929, the Pipe Company was indebted to the Bank on account of advances made against assigned accounts in the aggregate sum $157,609.61, and on direct loans totaling $20,000.00. (Tr. p. 94.) The Bank held the so-called general loan and collateral agreement of the Pipe Company. (Ex. "A", Tr. p. 10. Tr. pp. 71 and 132.) By the terms of that agreement "all moneys, chattels, negotiable instruments, securities, bills of lading, warehouse receipts, paper credits, demands, choses in action, rights and property of every kind, tangible or intangible, at any time in possession or control of said Bank * * * belonging to, for account or subject to the order" of the Pipe Company were assigned to and held by the Bank as security "for any and all indebtedness, obligation or liability of the undersigned (the Pipe Company) to said Bank, nor or hereafter existing, matured or not matured, absolute or contingent * * *." On said date in accordance with the general practice theretofore established as hereinbefore outlined, the Pipe Company made applica-

tion for a further advance of $3375.00 based on (a) an assignment to the Bank of the proceeds of an allegedly existing and accepted but wholly unfilled order from Twin Harbors Lumber Company of Aberdeen, Washington (Ex. "B", Tr. pp. 14 and 133), and (b) a bond of indemnity from the Pipe Company as principal and appellant as surety in the penal sum of $4000.00. The bond, after reciting that the Pipe Company had accepted a written order "from the Twin Harbors Lumber Company of Aberdeen, Washington, and/or The National Bank of Tacoma, Tacoma, Washington, dated January 19, 1929, for furnishing the following quantity of material:" (here followed specification of the quantity, size, and price of the material) "shipment to be made within sixty days, *which order is by reference made a part hereof as fully to all intents and purposes as if set forth at length herein*," (italics ours), was conditioned as follows:

> "Now, therefore, if the said principal shall supply the material in accordance with the written order and if they will indemnify Twin Harbors Lumber Company of Aberdeen, Washington, and/or The National Bank of Tacoma, Washington, against any direct or indirect damages that may be suffered or claimed for lack of delivery of material within the time called for; * * * then and in that event this obligation shall be void but otherwise it shall

remain in full force and effect." (Ex. "C", Tr. pp. 15-17, 117-118.)

The advance was made and to evidence the same the Pipe Company executed and delivered to the Bank in addition to documents (a) and (b) above its so-called assignment note for $3375.00. (Ex. "D", Tr. pp. 9-10, pp. 133 and 86.) The amount of the advance was deposited to the credit of the Pipe Company in its open or checking account with the Bank. (Ex. 23 and 21, Tr. pp. 136 and 140.) The expectation of the Bank was that if the asserted order with Twin Harbors Lumber Company had been filled, it would have received the entire proceeds of the assigned account (Tr. p. 88), which would have netted $3677.45 had there been such an order and had it been filled according to its terms. (Tr. p. 112.) Such proceeds would have repaid the particular advance and left a substantial margin for application under the general loan and collateral agreement upon the other indebtedness of the Pipe Company.

The order was not filled by the Pipe Company prior to April 19, 1929, when it went into receiver's hands nor by the receiver thereafter. (Tr. p. 88.) The Bank received nothing from the Pipe Company, its receiver, or the Twin Harbors Lumber Company on account of this transaction. The receiver of the Pipe Company found no such order in the records of that company (Tr. p. 113) and in fact

no such order was ever placed by the Lumber Company with the Pipe Company. (Tr. pp. 105 and 112.)

The Twin Harbors Lumber Company, which was a solvent, going concern throughout 1929 and up to the date of the trial (Tr. pp. 108 and 113), was never furnished with the bond here sued on, did not know of its existence, and neither made nor had any claim against such bond (Tr. pp. 106 and 107).

At the time of the trial the unpaid direct loans of the Pipe Company to the Bank amounted to $17,090.45 and the unpaid assigned accounts to $82,434.42. (Tr. p. 94, Ex. 25, Tr. p. 165, Ex. 24, p. 160.)

It should also be noted that the Bank had nothing to do with procuring the bond from the Surety Company, did not apply to the Surety Company for the Bond, nor furnish the Surety Company with any information upon which it was written. On the contrary, the bond was written by the agent of the Surety Company at the request of the Pipe Company. The usual practice was for Mr. Morrill, President of the Pipe Company, or someone in his office, either in person or by phone to notify the Surety Company that he had a contract and desired a bond, whereupon the bond and the application therefor was made up by the Surety Company and handed to Mr. Morrill when called for by him.

Mr. Caesar, agent and attorney in fact for the Surety Company, testified:

> "The data on which the recital in the bond was made was information supplied by Mr. Morrill or by his office, either oral or over the telephone, and the effect of it was that he had some kind of a contract to furnish material to somebody. * * * We wrote that bond based on the information that he furnished in that way. Certainly I knew The National Bank of Tacoma was not in the business of dealing in lumber. * * * After they (the bonds) were executed, Mr. Morrill took them. I do not know what he did with them positively. I did not see him but I think he took them to The National Bank of Tacoma, I am not sure. Before I executed any of these bonds I presumed they would be taken to (by) Mr. Morrill to The National Bank of Tacoma. I did not know it as a positive certainty. *I executed them with the idea and the understanding that is where they would come.*" (Tr. pp. 63 and 64.)

Upon this state of facts appellee contends:

I. That the bond sued on is an original, independent undertaking of the principal and the surety to it and therefore constitutes a contract or bond of indemnity.

II. That parol evidence was not only proper

but essential to establish the intent of the parties with respect to the bond and hence the nature or character of the bond itself.

III. That bonds of a compensated surety prepared by its agents are to be construed strictly against the surety and liberally in favor of the obligee and that parol evidence is admissible to ascertain the intention of the parties as to the purpose and scope of the bond.

IV. That in the particular circumstances the Bank was in fact the sole obligee under the bond, but if not, then, since the bond was intended and is to be construed as one of indemnity, its obligation is not joint but several and the Bank is entitled to recover its particular damages.

V. That the Surety Company is estopped by the recitals in the bond to claim either that there was no order for the material as recited or that that order was placed by any other than the Twin Harbors Lumber Company, but that there is no estoppel operating against the Bank.

VI. That accordingly the Bank is entitled to recover on the bond what it would have received had the alleged order been filled according to its terms but not exceeding the penal sum of the bond with interest thereon.

## POINTS AND AUTHORITIES

### I.

*The bond is an original contract or undertaking of indemnity.*

It was so held by the Supreme Court of Washington in *The National Bank of Tacoma vs. Aetna Casualty and Surety Company*, 161 Wash. 239, 296 Pac. 831.

It is a bond of indemnity by its terms and by definition.

> "The use of the word 'indemnity' shows the object and nature of the contract. It was to reimburse or make whole the assured against loss on account of such liability."
>
> *Frye vs. Bath Gas & Electric Co.*, 54 Atl. 395 at 396.

> "As relating to the contract of indemnity it (the word 'indemnity') may be more specifically defined as the obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit."

> "The promise in an indemnity contract is an original and not a collateral undertaking and in this respect differs from a guaranty. If the contract of indemnity refers to and is found-

ed upon another contract, either existing or anticipated, it covenants to protect the promisee from some accrued or anticipated liability arising upon such other contract. It is not a contract to answer for the contractual debt, default or miscarriage of another than the promisee, but a contract to indemnify the promisee from loss owing to his contractual liability. It is given to a person against his sustaining loss or damage."

31 *C. J., Indemnity*, p. 419.

"A definition of 'indemnity' as an obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit, though somewhat narrower than the broad definition given above is often quoted. By a contract of indemnity one may agree to save another from a legal consequence of the conduct of one of the parties or of some other person."

14 *R. C. L., Indemnity*, p. 43.

"There are many contracts of indemnity that have no reference to the indemnitee's covenants contained in some other contract, but are entered into to indemnify the promisee against losses from something other than his contractual liabilities, thus there can be a contract indemnifying the promisee against loss growing

out of an act or failure to act, such as a contract to indemnify one for loss that may grow out of a third party's failure to perform a contract."

*Eckhart vs. Heier*, 158 N. W., 403 at 404.

See also:

*Reed vs. Holcomb*, 31 Conn., 360;

*Smith vs. Delaney*, 29 Atl., 496;

*Wolthausen vs. Trimpert*, 105 Atl. 687, Conn.

It is established as an indemnity bond by the circumstances of its execution.

"The character of the bond is determined by its terms and the circumstances of its execution. *Miles vs. Baley*, 170 Calif. 151, 149 Pac. 48; *United, etc., Co. vs. Poetker*, 180 Ind. 255, 102 N. E. 372, *L. R. A.* 1917-*B* 984."

*Fid. & Dep. Co. vs. Duke*, 293 Fed. 661 at 663 (C. C. A. 9th Circuit).

"The correct rule is to give more weight to the general purpose of the bond, as indicated by all of its provisions, and the interests of the parties in the subject matter, than the precise form of words used in a particular clause; or, as said in *Evans vs. United States Fid. & Guar. Co.*, 195 Mo. 438, 192 S. W. 112, in speaking of the bond of a compensated surety: 'The bond is

to be construed in the same way as any other contract, that is, with regard to the intention of the parties and the purpose of the bond, as disclosed by the instrument, read in the light of the surrounding circumstances.' "

*Warren vs. National Surety Co.*, 149 Wash. 378 at 382 and 383.

See also:

*American Bonding Co. vs. Pueblo Inv. Co.*, 150 Fed. 17 at p. 27 et seq. (C. C. A. 8th Circuit).

II.

*The character of the bond being determined by the circumstances of its execution, parol evidence is not only proper but essential, not only to show such circumstances, the intentions of the parties to it, and the purpose for which given, but also to resolve the ambiguities inherent in its language.*

"In order correctly to ascertain the intentions of the parties to a deed, contract or other instrument of writing and properly to interpret the same, it is competent to inquire into the purpose for which the writing was executed and to this end parol evidence is admissible."

22 *C. J., Evidence*, Sec. 1586, p. 1184.

"Parol evidence is admissible to show the

situation of the parties and the circumstances under which a written instrument was executed for the purpose of ascertaining the intentions of the parties and properly construing the writing."

22 *C. J., Evidence*, Sec. 1590, p. 1186.

"Like all other contracts the undertakings of a surety must be construed fairly and reasonably according to the intention of the parties. If the surety has used ambiguous language and the party secured has advanced his money on the faith of the interpretation most favorable to his rights, that will ordinarily prevail if the instrument is open reasonably to such interpretation."

*Smith vs. Molleson*, 42 N. E. 669, at p. 670.

"A contract of suretyship is to be construed in accordance with the same rule that applies to the interpretation of any other written instrument. The limitation of liability is not upon the interpretation, but in the application of the contract after the interpretation, * * *. *Smith vs. Molleson*, 148 N. Y. 241, 42 N. E. 669. If there be ambiguity in the contract it is construed in favor of the person who has accepted it and expects to take benefit under it. *Gambol vs. Cuneo*, 21 App. Div. 413, 47 N. Y. 548. Affirmed in 162 N. Y. 634, 57 N. E. 1110. In

arriving at the correct construction of such a contract it is always permissible to take into consideration the circumstances and surroundings of the parties at the time when the contract was made and such construction will be given to it as will carry out the evident intent of the parties to the instrument."

*Sachs vs. American Surety Co.*, 76 N. Y. S. at p. 337.

"The one purpose of all construction and interpretation is to ascertain the intent actuating the parties to the agreement if that end can be accomplished consistently with the rules of evidence. It may often appear (and does quite readily appear in the instant case) that to ascertain the real scope and effect of the bond necessitates reference to the facts and circumstances of the entire transaction to which it was a part. As said by this court in *Jacobs vs. Jacobs*, 42 Iowa 605: 'The whole contract must be considered in determining the meaning of any of its parts. The first point is to ascertain what the parties meant, and then to put such construction upon their contract as will bring it as near to their actual meaning as the words they saw fit to employ, when properly construed, * * * will permit. In arriving at this meaning the subject matter of the contract, the situation of the parties and of the property, and

the purpose of the parties in making the contract must be considered.' * * * The objects which the parties had in view in inducing the contract are also to be considered in its construction. * * * As the actions of men are usually the index of their intentions it is obvious that their acts may be proved, in connection with their contracts, in order to arrive at their true intention in regard to the obligations they assume and accept from others."

*U. S. F. & G. Co. vs. Iowa Tel. Co.*, 156 N. W. at p. 730. Quoted with approval in the above form in *Aetna Casualty & Surety Co. vs. State*, 298 S. W. at p. 504.

"It will be conducive to brevity and perspicuity to obtain a clear idea of the relations of the parties to the agreement to be considered, their respective covenants therein and the moving considerations which induced them to make their stipulations before entering upon the discussion of this issue. This conception must be secured by the light of the fundamental rule that the situation of the parties when the contract was made, its subject matter and the purpose of its execution are material to determine the intention of the parties and the meaning of the terms they used, and when these are ascertained they must prevail over the dry words of the stipulations."

*Kauffman vs. Raeder*, 108 Fed. 171 at 175, per Sanborn J.

"The ascertainment of the true intention is the great rule for the construction of contracts and the favor with which the law regards a surety does not make his undertakings an exception."

*Bordt vs. McCutchon*, 157 Fed. at 184, per Hook J.

"In case of ambiguity or doubtful construction the bond should be construed in the light of the circumstances surrounding the execution thereof, the object to be accomplished, the situation of the parties, and the relations existing between them."

9 *C. J., Bonds*, p. 33.

"As has been seen obligees as a matter of law cannot be entitled jointly and severally. It is necessary therefore to determine where there are several obligees whether their rights are joint or whether they are several * * * but it is now well established that * * * 'If there be words capable of two constructions we must look to the interest of the parties which they intend to protect and construe the words according to their interest.' This rule is not very easy to apply, though its validity may be regarded as established."

*Williston on Contracts*, 1920 Ed., Vol. I, Section 325, p. 612.

See also:

*Davis vs. Patrick*, 141 U. S. 479, 35 L. Ed. 826;

*Aetna Casualty & Surety Co. vs. State*, 298 S. W. 501;

*Reed vs. Holcomb*, 31 Conn. 360;

*Wolthausen vs. Trimpert*, 105 Atl. 687;

*Zalkin vs. Sunshine Sales Corporation*, 231 N. Y. S. 571.

The terms of the bond that the principal and surety "are held and firmly bound unto Twin Harbors Lumber Company of Aberdeen, Washington, *and/or* The National Bank of Tacoma, Tacoma, Washington," as well as the recital that "the said principal has accepted a written order from the Twin Harbors Lumber Company of Aberdeen, Washington, *and/or* The National Bank of Tacoma, Tacoma, Washington," are ambiguous and uncertain in their import. This is admitted by appellant. (Appellant's brief, pp. 14 and 21.) The recital does not assert that the order was given by the Bank or that it was given by the Lumber Company or by both. It only says that the order was given by one or by the other or by both. Parol evidence is therefore essential to show what the

fact was and neither such fact nor the evidence established thereby conflict in the slightest degree with the recitation. Until the fact is determined, which can only be by parol evidence, the purpose and intent underlying the giving and acceptance of the bond and hence the true construction to be placed thereon cannot be ascertained.

> "The expression *and/or* is quite frequently used in contracts * * *. When used in a contract, the intention is that the one word or the other may be taken accordingly as the one or the other will best effect the purpose of the parties as gathered from the contract taken as a whole. In other words such an expression in a contract amounts in effect to a direction to those charged with construing the contract to give it such interpretation as will best accord with the equity of the situation, and for that purpose to use either 'and' or 'or' and be held down to neither."

*State vs. Dudley*, 106 So. 364 at 365.

See also:

*Cuthbert vs. Cumming*, 10 Exch. 809 at 814.

The reference to the order in the concluding clause of the recital in the bond put the surety on inquiry and charged it with notice of what that inquiry would have disclosed, and therefore entitled the Bank to show by parol what the inquiry would

have disclosed, namely, that the order referred to purported to be solely between the Pipe Company and the Lumber Company.

*Nazareth Foundry & Machine Co. vs. Marshall Machinery & Supply Co.*, 102 Atl. 268 at 270.

III.

*Bonds of compensated sureties are construed strictly against the surety and liberally in favor of the obligee or beneficiary.*

"A contract in which a corporation or person for profit had undertaken to insure the obligee against a failure of performance on the part of the principal obligor should be liberally construed, and not according to the rule of strictissimi juris. *Guaranty Co. vs. Pressed Brick Co.*, 191 U. S. 416, 24 Sup. Ct. 142, 48 *L. Ed.* 242; *Illinois Surety Co. vs. John Davis Co., et al*, 244 U. S. 376, 37 Sup. Ct. 614, L. ed. 1206; *Brogan vs. National Surety Co.*, 246 U. S. 257, 38 Sup. Ct. 250, 62 L. ed. 703, L. R. A. 1918-D, 776."

*U. S. vs. George F. Pawling & Co.*, 297 Fed. 65 at 68.

"In dealing with the bonds of a compensated surety, they are to be most strictly construed against the surety, and where the terms of such

a bond are susceptible of more than one construction the court will adopt that construction most consistent with the purpose to be accomplished, which would be the construction most favorable to the beneficiary. *Stearn's Suretyship (3d Ed.)*, p. 404; *Southern Surety Co. vs. Kinney*, 74 Ind. App. 205, 127 N. E. 575; *Northern Pacific R. Co. vs. Fidelity & Dep. Co.*, 74 Wash. 543, 134 Pac. 498; *Costello vs. Bridges*, 81 Wash. 192, 142 Pac. 687, L. R. A. 1915-A 853."

*Duke vs. Nat. Surety Co.*, 130 Wash. 276 at 279, affirmed in 131 Wash. 700.

"Elementary rules of construction of indemnity contracts of this nature prepared by the indemnitor in stereotyped form, as this contract manifestly was prepared by the insurance company, call for a construction most strictly against the indemnitor."

*Stusser vs. Mutual Union Ins. Co.*, 127 Wash. 449 at 455.

"In the interpretation of indemnity contracts, the cardinal rule is that which applies to contracts generally, i. e., to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Contracts of indemnity, therefore, must receive a reasonable construction so

as to carry out, rather than defeat, the purpose for which they were executed. To this end they should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design; nor, on the other hand, so loosely or inartifically as to relieve the obligor from a liability within the scope or spirit of their terms. Where the general import of a contract is one of indemnity, it is the rule that all of the words used therein should be construed to be in harmony with, and subservient to, the general purpose of the bond. When applied, however, this rule should be in aid of the intention of the parties and should not be employed to defeat their purpose. Hence if a bond contains both a covenant to indemnify against loss and a covenant guaranteeing the performance of a specific thing, the latter covenant will not be subordinated to the former, but both will be given their full effect, and accordingly a failure to do the thing specified will constitute a breach of the bond, on the happening of which a cause of action will arise."

14 *R. C. L., Indemnity*, 46.

See also:

*National Surety Co. vs. Campbell*, 108 Wash. 596, 185 Pac. 602;

*German-Am. Bank vs. Illinois Surety Co.*, 99 Wash. 9; 168 Pac. 772;

6 *R. C. L., Contracts*, p. 854.

The rule applies with all vigor where a bond is prepared by the surety company, and in such case all ambiguities are to be resolved against the surety company.

> "If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers or agents of the surety company."

*American Surety Co. vs. Pauly*, 170 U. S. 133, at 144, 42 L. Ed. 977, at 981.

> "Where a policy of insurance is so framed as to leave room for two constructions the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys, officers or agents prepared the policy and it is its language that must be interpreted."

*Liverpool, etc., Ins. Co. vs. Kearney*, 180 U. S. 132, at 136, 45 L. Ed. 460, at 462.

"It is undisputed that appellant is a paid surety and therefore it is not a favorite of the law as is a non-compensated or accommodation surety, that its contract is to be construed rather as an indemnity insurance than a suretyship, and that where there is an ambiguity the construction will be adopted most favorable to the person intended to be protected."

*Hartford Accident & Indemnity Co. vs. State*, 159 N. E., 21, at 25.

See also:

*Maryland Casualty Co. vs. Bank of England*, 2 Fed. (2d) 793 (C. C. A. 8);

*New Amsterdam Cas. Co. vs. Central Nat. Ins. Co.*, 4 Fed. (2d) 203, at 207.

The bond here is to be construed according to these rules.

*National Bank of Tacoma vs. Aetna Cas. & Sur. Co.*, 161 Wash. 239, at 249.

## IV.

*(a) The appellee Bank is in fact the sole obligee under the bond, but if not, (b), the obligation of the bond is several and the appellee is entitled to recover its particular damage.*

(a) This rests on parol evidence of the situation of the parties and the circumstances under which the bond was written, the propriety and competency of such evidence being governed by authorities heretofore cited.

There was no delivery of the bond to Twin Harbors Lumber Company, either actual or constructive, and none was intended. Delivery of a bond is essential to its validity.

9 *C. J. Bonds*, Section 24, page 16;

4 *R. C. L. Bonds*, Section 5, page 48.

(b) That the bond's obligation is several was held in *The National Bank of Tacoma vs. Aetna Casualty & Surety Co.*, 161 Wash. 239, 296 Pac. 831.

> "A bond given to two or more obligees may be given to them jointly or severally but not jointly and severally. The general rule is that if the interest of the obligees is joint, the bond will be deemed to have been given to them jointly; if their interests are several, then severally." 9 *C. J., Bonds*, pp. 38 and 39.

> "Where the legal interests and cause of action of the obligees is several and not joint, the covenant is taken to be several and each of the obligees may bring an action for his particular damages."

4 *R. C. L., Bonds*, Sec. 31, p. 65.

See also:

*Title Guaranty & Surety Co. vs. Foster*, 203 Pac. 231 at 238 et seq;

*Williston on Contracts*, 1920 Ed. Vol. I, Sec. 325, p. 612;

*Atlantic, etc., Rwy. Co. vs. Thomas*, 53 So. 510;

*Harrington vs. Gordon*, 42 Wash. 692;

*Beckwith vs. Talbot*, 95 U. S. 289, 24 L. ed. 496;

*Anderson vs. Nichols*, 107 Atl. 116;

*Emmeluth vs. Home Benefit Assn.*, 25 N. E. 235;

*Dashley vs. Daniel*, 202 Fed. 427, (C. C. A. 9th).

## V.

*Appellant Surety Company is estopped by the recitals in its bond to deny that there was an accepted, written order of the purport set out, given either by the Lumber Company or by the Bank or by both.*

"The material recitals in a bond estop both principal and sureties * * * as effectively

as material recitals in a deed estop the parties thereto."

21 *C. J., Estoppel,* Sec. 84, p. 1096, and numerous cases there cited.

VI.

*There is no estoppel against appellee.*

The bond in question is a sealed instrument to which the Bank is not a party and to which its seal is not affixed. As to it the bond is in effect a deed poll. There is no estoppel against the grantee in a deed poll.

*Robertson vs. Pickerel,* 109 U. S. 608 at 614 and 616, 27 L. ed. 1049 at 1051 and 1052.

The recitals are wanting in the necessary certainty to work an estoppel against the Bank.

"A recital that does not amount to a precise affirmation of a fact will not estop the party to deny the fact."

21 *C. J.,* p. 1112.

"In order to create an estoppel the instrument by which the estoppel is claimed must be precise and certain and the intention clear and unambiguous. * * * An estoppel cannot be extended beyond the exact terms of the admis-

sion so as to preclude a party from establishing facts not inconsistent therewith."

21 *C. J.*, *Estoppel*, p. 1102.

"To found an estoppel the recital must be certain. With this idea in mind recitals have been classified as being either general or particular. General recitals are such as do not definitely affirm or deny the existence of some fact or either expressly or impliedly show a clear intention of the parties that either one or the other or both of them shall be concluded from disputing the fact recited. These do not work an estoppel as to the fact in question."

21 *C. J.*, *Estoppel*, p. 1090.

"An estoppel says Coke, because it concludeth a man to allege the truth must be certain to every intent and not to be taken by argument or inference. *Coke on Litt.*, 352 B. It should be certain to every intent and therefore if the things be not directly or precisely alleged or be a mere matter of supposal, it shall not be an estoppel. *Wright vs. Bucknell*, 2 Barn. & Ad. 278. To work an estoppel a recital should clearly affirm or deny some present or past fact or admit some liability definitely stated."

*Calkins vs. Copeley*, 29 Minn. 471 at 473.

"But before an admission (contained in a

recital) can have that effect (i. e., to create an estoppel) it must be so broad and certain as to admit of no other construction. Courts are not permitted to indulge in suppositions or to draw inferences from the language employed in such cases."

*Zimler vs. San Louis Water Co.*, 57 Cal. 221 at 223.

See also:

*Bigelow on Estoppel*, 6th Ed., pp. 398 and 399;

*Jackson vs. Allen*, 120 Mass. 64 at 79;

*Wright vs. Bucknell*, 2 Barn. & Ad. 278, 22 E. C. L. 122.

There is no basis for an "estoppel in pais" against the Bank.

The plaintiff Bank made no admission or statement to the Surety Company to procure the issuance of this bond, the Surety Company in issuing and writing the bond did not act on anything that the Bank or any of its officers said or did, relied upon no representations or actions of the Bank, and has been in no manner injured by anything which the Bank has done.

"To constitute an 'estoppel in pais' there must concur an admission, statement, or act

inconsistent with the claim afterward asserted, action by the other party thereon and injury to such other party."

21 *C. J. Estoppel,* 1119.

## VII.

*Appellant having rested upon its motion for a directed verdict, it is concluded by the court's direction of a verdict in favor of appellee, there being substantial evidence to sustain that verdict.*

"The established rule is, 'Where both request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn therefrom,' and upon review a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it."

*Williams vs. Vreeland,* 250 U. S. 295, 63 L. ed. 980, 3 A. L. R. 1038 at 1040.

"The effect of this (that both sides moved for a directed verdict) was to waive a jury trial and submit all questions of fact as well as of law to the judge. He has found in favor of the plaintiff and we are powerless to review his findings unless satisfied after viewing the evi-

dence in the light most favorable to plaintiff and resolving all controverted questions in his favor that there was no evidence upon which the finding can be sustained; in other words, unless we think that upon the evidence a verdict should be directed for the defendant as a matter of law."

*Swift & Co. vs. Columbia Ry. Gas & Electric Co.*, 17 Fed. (2d) 46 at 49 (C. C. A. 4th Circuit).

See also:

*Beuttell vs. Magone*, 157 U. S. 154, 39 L. ed. 654;

*Sena vs. American Turquoise Co.*, 220 U. S. 497, 501, 55 L. ed. 559;

*Lawton vs. Carpenter*, 195 Fed. 362 (C. C. A. 4th Circuit);

*Linsky vs. United States*, 6 Fed. (2d) 869 at 870 (C. C. A. 1st Curcuit).

## VIII.

*Appellant's assignments of error VII and VIII are insufficient to review the action of the trial court in admission and rejection of evidence.*

"When the error alleged is to the admission or to the rejection of evidence, the assignment

of error shall quote the full substance of the evidence admitted or rejected. * * * and errors not assigned according to this rule will be disregarded."

*Rule XI C. C. A.* 9;

*Lee Tung vs. U. S.*, 7 Fed. (2d) 111 (C. C. A. 9);

*Clark vs. U. S.*, 265 Fed. 104, (C. C. A. 8);

*Weiland vs. Pioneer Irr. Co.*, 238 Fed. 519, at 523, (C. C. A. 8).

## IX.

*Interest is uniformly allowed as damages for the withholding of payment of money after due date.*

"Where money is withheld after payment is due interest is, as a general rule, allowable as damages in actions based upon either express or implied contracts."

17 *C. J., Damages*, Section 136, page 811.

"Where an injury consists of a deprivation of money the compensation established by the business practice of many generations is the current rate of interest, and such is the measure of damages adopted by the law. The profits which might have been made by the use of

the money are too conjectural to be considered."

1 *Sedgwick on Damages*, 9th Ed., Section 179;

*Mahon vs. Harney County Nat. Bank*, 206 Pac. 224, at 228.

"In the United States, by the great weight of authority, interest may be allowed on the principal sum although the recovery may be more than the amount of the penalty. * * * Under the rule noted as the majority rule, where the damages equal or exceed the penalty, interest is to be computed on the penalty, and the judgment cannot exceed the penalty and interest thereon from the time of breach or the commencement of the action."

9 *C. J., Bonds*, Section 244, pages 132 and 133;

*Cf.* 17 *C. J., Damages*, Section 216, p. 922;

*Platt vs. Carroll*, 119 S. E. 180 at 183;

*Southern Surety Co. vs. Enfield*, 229 Pac. 446, at 449, 450;

*U. S. F. & G. Co. vs. Koeler*, 137 S. E. 85 at 93;

*Collins vs. Tarrant County*, 242 S. W. 1105, at 1106.

In Washington, interest is allowed as damages for non-payment of unliquidated demands which are capable of ascertainment by computation.

*Park vs. Elmore*, 59 Wash. 584.

X.

*For general authority sustaining the recovery allowed see:*

17 *C. J.* 1027;

*Johnson vs. Cook*, 24 Wash. ~~274~~ 474;

*Warren vs. National Surety Co.*, 149 Wash. 378;

*Province Securities Corp. vs. Maryland Casualty Co.*, 168 N. E. 252;

*Peoples Bank vs. Aetna Ind. Co.*, 98 Atl. 353;

*Equitable Trust Co. vs. Nat. Surety Co.*, 63 Atl. 699;

*American Bonding Co. vs. Pueblo Inv. Co.*, 150 Fed. 17;

*O'Brien vs. Surety Co.*, 203 Fed. 436;

*Sylvester Watts Smith Realty Co. vs. American Surety Co.*, 238 S. W. 494;

*Rock vs. Monarch Building Co.*, 100 N. E., 887;

*Mohawk Co. vs. Bankers Surety Co.*, 156 N. W. 154;

*Janes vs. Scott*, 59 Penn. 178, 98 Am. Dec. 328;

*Union Trust Co. vs. Citizens Trust Co.*, 39 Atl. 886;

*Fidelity Trust Co. vs. American Surety Co.*, 175 Fed. 200, affirmed with adoption of opinion of the Circuit Court in 179 Fed. 699;

*U. S. vs. Fidelity & Guaranty Co.*, 236 U. S. 512, 59 L. Ed. 696;

*Maryland Casualty Co. vs. Wellston*, 148 Pac. 691.

## ARGUMENT

### I.

*Bank Is Entitled to Recover on Bond*

This appeal being from a judgment entered upon a directed verdict after the trial court had denied appellant's motion for a directed verdict in its favor, appellant has the burden of sustaining the proposition that under the evidence the verdict should have been directed in its favor as a matter of law.

It postulates its argument upon two propositions:

> "First, that the bond runs to two obligees, and second, that either both of them jointly or one of them had given to the Wood Pipe Company an order for the purchase of materials."
>
> Appellant's brief, p. 14.

These propositions are said to be conclusively established by the terms of the bond, although specific reference is made to the recitals only. The obligatory language is to the effect that the principal and surety "are held and firmly bound unto Twin Harbors Lumber Company of Aberdeen, Washington, *and/or* The National Bank of Tacoma, Tacoma, Washington, in the penal sum of Four Thousand and no/100 ($4,000.00) Dollars, * * *." This language in its essential, italicized part is identical with the language of the recital. Appellant's second proposition therefore belies its first. If the recital that the Pipe Company, the principal in the bond, has accepted a written order from the Lumber Company "*and/or*" the Bank, means only that either the Lumber Company *and* the Bank had given the order or that *one of them alone* had done so but without designating which one, then assuredly the language wherein and whereby the principal and surety bind themselves unto the Lumber Company "*and/or*" the Bank means no more than that they are bound either unto both of the named

obligees or only unto one or the other of them.

The bond itself therefore presents two questions of fact for determination, namely, By whom was the order placed? To whom did the bond run?

The expression "*and/or*" in a contract,

> "Amounts in effect to a direction to those charged with construing the contract to give it such interpretation as will best accord with the equity of the situation and for that purpose to use either 'and' or 'or' and be held down to neither." *State vs. Dudley*, 106 Southern 364 at 365.

The trial court's determination of these questions of fact in favor of appellee necessitated the direction of a verdict in its favor and appellant is concluded thereby. (See Proposition VII and authorities there cited, pp. 30-31, supra.)

To avoid this result appellant has resort to a secondary proposition that there is no question of fact involved because the appellee as a party to the bond is estopped by its recitals. (Appellant's brief p. 18.)

The recitals confessedly mean no more than that the order was placed by both the Lumber Company and the Bank or by the Lumber Company alone or by the Bank alone. There is nothing in the bond itself from which it can be determined

which of the alternatives was intended. The recitals are therefore lacking in the certainty essential to create or work an estoppel. They do not amount to the precise affirmation of the fact as to who ordered the materials from the Pipe Company and therefore do not preclude the Bank from establishing the fact that it did not place the order. That fact is not inconsistent with the recital. In *Wright vs. Bucknell*, 2 Barn. & Ad., 278, 22 E. C. L. 122, supra, p. 29, an estoppel was claimed based upon a recital that the grantor was "legally or equitably seized of the premises." The court held that there was no estoppel since a recital in the alternative was not conclusive of either alternative alone and therefore the truth might be shown as to which alternative was correct. The recital here is in the alternative and the Bank therefore is not estopped from showing that it was not the party who had ordered the materials from the Pipe Company.

The authorities cited by appellant (brief pp. 18 and 19) in support of this claim of estoppel are all predicated either upon an agreement or assumption by the parties as to the existence of a particular fact. Here it is undisputed that the Surety Company and the Bank at no time agreed or assumed that there was any contract of sale of manufactured lumber between the Pipe Company and the Bank, but on the contrary, the Surety Company knew that whatever contract of that kind there

purported to be was between the Pipe Company and the Lumber Company solely, and knew that the Bank, based on the recitals in the bond, did assume and rely upon such being the fact. Moreover, the incorporation of the purported order into the bond by direct reference thereto bound the Surety Company to the facts of the order shown on the invoice or statement accompanying and forming part of the Pipe Company's assignment to the Bank. Reasonable inquiry on the Surety's part would have disclosed such facts. The correspondence between the details of the order recited in the bond with the details thereof shown in the invoice or statement assigned to the Bank entitled the Bank to rely on the bond as guarantee that the Pipe Company had accepted such an order from the Lumber Company and as indemnity against the loss which would follow if the collateral tendered by the assignment of the proceeds of that order never became enforceable.

Finally, appellant in effect asks this court to eliminate from consideration the evidence showing the situation of the parties, the circumstances under which and the purposes for which the bond was executed, and with that testimony disregarded, urges upon this court a conclusion contrary to that of the trial court.

In so doing appellant would wholly divorce the bond from the circumstances under which it was

given and from the purposes which it was designed to serve, and then so interpret or construe it as to render it a worthless scrap of paper.

To this end it now asserts that "its (the bond's) entire purpose was to protect the second party to a contract to which the Wood Pipe Company was the first party." (Appellant's brief, p. 21.) Therefore it argues the bond was wholly meaningless and ineffective because, using its own phraseology, "the bank, not being a party to the 'contract' with the Pipe Company, was not in fact an obligee under the bond." The corollary to that proposition, although not stated by appellant, is that although the Lumber Company was the second party to the contract and therefore, under appellant's theory, the sole obligee of the bond, nevertheless the bond never became effective or enforceable by the Lumber Company because never delivered, nor intended to be delivered, to it.

It is a fairly desperate last stand when appellant is compelled to argue that the proper construction of its so-called bond is one which renders it utterly worthless. However, such argument, even for what it may be worth, is not open to appellant.

Its assignments of error numbers VII and VIII (Tr. pp. 169 and 170, cf. specifications of error numbers 7 and 8, appellant's brief, pp. 10 and 11), which are the only assignments based on the admission or rejection of evidence, are insufficient to pre-

sent a claim of error for review by this court. Such assignments do not, "Quote the full substance of the evidence admitted or rejected," as required by Rule 11 of this court. No argument is attempted in support of them. (Cf. appellant's brief p. 23.)

> "Counsel did not deem the question of sufficient importance to discuss it in his brief and we do not consider it of sufficient moment to depart from the general rule that such assignments will not be considered. *Clark vs. United States* (C. C. A.), 265 F. 104, 107." *Lee Tung vs. United States*, 7 F. (2d) 111, 112 (C. C. A. 9th).

It is a primary and paramount rule for the construction and interpretation of contracts that it is presumed that the parties to an instrument intended that it shall be effectual and not nugatory. 6 *R. C. L. Contract*, Sec. 239, p. 840. Accordingly, where a contract is susceptible of two meanings, one of which will uphold the contract and enable it to have and be given effect and the other of which will destroy it or render it ineffective, the former will be adopted so as to uphold the contract. 13 *C. J. Contracts*, Sec. 506, et seq, pp. 539, et seq. Appellant, by admitting that the language of the bond's recitals provide for *one* of three alternative situations (appellant's brief, p. 14), thereby conclusively answers, if it does not wholly preclude, its later argument that the only possible construc-

tion of the bond affords the Bank no right of recovery thereon.

The great rule for the construction of contracts is the ascertainment of the true intention of the parties. That intention is to be ascertained by a consideration of the subject matter of the contract, the situation of the parties when it was made, and the purpose of its execution. When, from such considerations, the intent actuating the parties has been ascertained, it is the duty of the court to put such construction upon the contract as will bring it as near as possible to the actual intent of the parties, for that intent must prevail over the dry words of the contract. (See Propositions I and II, pp. 10-19, supra.)

Applying these general rules, not less than six judges, two trial courts and the Supreme Court of the State of Washington, have unhesitatingly concluded that this bond, or a bond of identical language given under similar circumstances, was an original undertaking on the part of the Pipe Company and the Surety Company, appellant here, to indemnify the Bank against any loss which it might sustain because of the failure of the Pipe Company to complete and fulfill the order for materials so that the Bank would have a valid and enforceable claim for the invoice price thereof against the Lumber Company ordering the materials. So, in sustaining the Bank's recovery in a companion

case, the Supreme Court of Washington, in *National Bank of Tacoma vs. Aetna Casualty Company*, 161 Wash. 239, said at page 245:

> "It was proper and competent for the trial court to receive evidence to ascertain the intention of the parties when this indemnity bond was given and delivered. To that extent, it was relevant and competent to show that the agent of the surety company had knowledge that the pipe company was under the necessity of securing advances on contracts received and accepted from a bank before the contract had been performed. It was also competent to show that the bank advanced the money on this particular order only upon the assurance that the order would be indemnified by some acceptable surety company."

Summarizing that evidence, which summary can equally well be made here for the evidence is to all practical purposes the same, the Washington court further said:

> "The American Wood Pipe Company was in a bad condition financially. It had reached a point where it was not able to carry on its business without financial aid. It received this order from the Twin Harbors Lumber Company of Aberdeen, which it could not fill because it did not have the money to manufacture the goods.

"It went to the Bank to get the money with which to carry on this manufacture. It told the Bank it had this order. The Bank said that it could not accept that order as collateral security for any loan and required some other and further assurance, something more definite. The upshot was that the bond in question was put up and when the bond was put up the Bank furnished the money. * * * In order to get the money to fill the order of the Twin Harbors Lumber Company, the Pipe Company procured and delivered the bond of the Surety Company. The Surety Company gave a bond, a condition of which is that, 'Whereas the principal has accepted a written order from the Twin Harbors Lumber Company, now, if the Pipe Company will supply the material in accordance with the written order, to indemnify the Bank against any direct or indirect damages which may be suffered by a lack of delivery of material within the time specified, then the bond to be void.'

"The Bank had nothing to do with the furnishing of the material to the Lumber Company. The only thing it was to do was to furnish the money to manufacture and ship the material to the Lumber Company. There was no other purpose for mentioning the Bank in the bond. The only reason it was mentioned at all was because it put up the money to aid the

Pipe Company to manufacture the articles for the Lumber Company.

"The Pipe Company contracted that it would manufacture and ship the goods according to order. If this contract had been complied with and the goods had been manufactured and shipped to the Lumber Company, the Bank, under the testimony, would have suffered no damage because it would have received the proceeds and recovered its money advanced to the Pipe Company; * * *

* * * * *

"Obviously, however, appellant's agents knew full well that the Bank did not manufacture lumber and lumber products and that its principal did. Without any evidence they knew that the sole business of the Bank was loaning money. Disregarding some of the evidence introduced as of doubtful relevancy and competency other than that appellant's agents knew of the intended loan of the money by respondent upon the signed order in this bond, and sticking closely to the terms of the bond for the purpose for which it was knowingly and advisedly given by appellant, we are convinced that the bond in its terms as an indemnity bond was given for no other purpose than to indemnify respondent against the loss suffered by the non-fulfillment of the order of the Twin Harbors Lumber

Company as adjudged by the trial court."

Opin. 161 Wash., pp. 246-248.

As was well said by the Supreme Court of Connecticut in *Reed vs. Holcomb*, 31 Conn. 360:

> "It is often difficult, from the mere words in which a promise is made, to determine whether any credit was given to a third person, and the undertaking, therefore, collateral to the engagement or liability of such person, or whether it was a wholly independent and original undertaking. In such cases courts must rely upon the circumstances of each particular case, and its general features, in order to ascertain the intention of the parties, and how they viewed it, where it is doubtful whether it was a contract of suretyship or guaranty, or an original undertaking."

Applying that rule to the facts disclosed by the evidence here, as did the Supreme Court of Connecticut in the case cited, and as the Connecticut court did more recently in *Wolthausen vs. Trimpert*, 105 Atl. 687, to which case the attention of this court is especially requested, we believe it is established beyond question that the bond here sued on is a direct and original undertaking of indemnity on the part of the Pipe Company and the Surety, appellant here. It is not an undertaking collateral to a contract between the Pipe Company

and the Bank for the supplying of manufactured lumber, for no such contract existed. It is not collateral to the Pipe Company's assignment note; it does not by its terms purport to be; it was not so intended. Had it been it would in effect have been a guarantee of payment of the indebtedness evidenced by such note, whereas in fact the Bank assumed all risks of collection of the proceeds of the order, e. g., the risk of insolvency of the Lumber Company, and looked to the bond to insure that through the shipment of the material according to the order there would be perfected in the Bank a legally enforceable, though actually uncollectible, claim against the orderer of the materials.

The decision of the Washington Supreme Court in 161 Wash. 239, 296 Pac. 831, is criticized at length (App. brief, pp. 23-30). The occasion therefor is clear; the justice and validity of the criticism are denied.

In the case in the state court, as here, the Bank by its complaint sought recovery of the damages sustained by it through the failure of the Pipe Company to carry out its recited contract with the Lumber Company, said damages being stated to be the amount of the invoice price of the goods covered by the order with interest from the due date thereof. In both cases the Bank contended that in reliance upon the bond of the Surety Company it had taken an assignment of the entire proceeds of the

order recited in the bond as security for a new advance of money and for any other indebtedness which might be owing by the Pipe Company. But on the trial in the state court the Bank did not attempt to prove that it held the assignment of the proceeds of the order as collateral for anything other than the advance evidenced by the so-called assignment note. It did not prove the general loan and collateral agreement in evidence here as Exhibit 13 (Tr. pp. 10-13 and 132), nor offer any evidence of any indebtedness of the Pipe Company to it other than that created by the advance made after the bond there sued on was furnished. Consequently the only damages with which the state courts were concerned were the unpaid balance evidenced by the assignment note similar in form to that in evidence here as Exhibit 18 (Tr. pp. 9 and 133) plus the accrued interest thereon. Both the arguments made and the opinion of the State Supreme Court are necessarily limited by and to be considered in connection with the proof as made.

The state court held that such a bond is an original undertaking and a contract of indemnity. Appellant's criticism of this holding is in line with its general argument and contention. That criticism might have some justification if the bond must be interpreted as though it ran to the Bank as vendee of materials from the Pipe Company, a position which it never occupied. In other words, if the facts must be distorted to fit the bond, inter-

preted wholly in the Surety Company's favor, then there may be some basis for the criticism. On the other hand, if the bond must be interpreted in the light of the facts and be given effect according to those facts and the disclosed intention of the parties so far as can be done without being inconsistent with the language of the bond itself, then the State Supreme Court was correct in its holding and entirely justified in stating that the condition of the bond related to an accepted order from the Lumber Company alone, for such was indubitably the fact.

That there are some inaccuracies of statement in the opinion of the state court is not disputed. Thus the statement from that opinion quoted on page 28 of appellant's brief clearly should have been, "Obviously, however, appellant's agents knew full well that the Bank did not *deal in* manufactured lumber and lumber products and that its principal did." But the minor inaccuracies such as this which are to be found in the opinion do not afford a basis of distinction or militate against its soundness. In the last analysis the crux of appellant's criticism is simply that the state court did not adopt and follow appellant's argument and did not give to the bond prepared by the Surety Company's agents a strict interpretation which would relieve the Surety Company from all liability.

Summarizing, it is submitted that:

The bond is not one of "plain meaning." Accordingly, the authorities cited on pages 15 to 18 of appellant's brief are inapposite. The rule applicable here was recognized, although the facts were held not to warrant its application, by the Circuit Court of Appeals for the 8th Circuit, in *New Amsterdam Cas. Co. vs. Central Nat. Fire Ins. Co.*, 4 Fed. (2d) 203 at 207 as follows:

> "When a provision of a bond by a surety or insurance company is ambiguous and subject to two different constructions, * * * it will be construed against the Surety Company."
>
> "Where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer."
>
> *Liverpool, etc., Ins. Co. vs. Kearney*, 180 U. S. 132, 135, 45 L. ed. 460, 462.

The bond having been wholly prepared by the surety's agents, it will be construed most strongly against it and any ambiguities will be resolved against the Surety Company.

> *American Surety Co. vs. Pauly*, 170 U. S. 133, 144, 42 L. ed. 977;
>
> *Maryland Cas. Co. vs. Bank of England*, 2 Fed. (2d) 793, (C .C. A. 8th);

*Hartford Accident Ins. Co. vs. State*, 159 N. E. 21, 25.

The only construction which will fit the facts and give effect to the intention of the parties is that given by the trial court.

It is not essential to a contract of indemnity that thereby the indemnitor undertakes to save the indemnitee harmless from loss resulting from his contractual liabilities.

> "By a contract of indemnity one may agree to save another from a legal consequence of the conduct of one of the parties or of some other person."

14 *R. C. L., Indemnity*, p. 43.

> "There are many contracts of indemnity that have no reference to the indemnitee's covenants contained in some other contract but are entered into to indemnify the promisee against losses from something other than his contractual liabilities. Thus there can be a contract indemnifying the promisee against loss growing out of an act or failure to act such as a contract to indemnify one for loss that may grow out of a third party's failure to perform a contract."

*Eckhart vs. Heier*, 158 N. W. 403, 404.

See also:

*Reed vs. Holcomb*, 31 Conn. 360;

*Wolthausen vs. Trimpert*, 105 Atl. 687.

The bond here was to indemnify the Bank against the loss or damage which it might sustain if the Pipe Company failed to perform its contract with the Lumber Company, and as a result the proceeds of that contract never became a claim enforceable by the Bank against the Lumber Company. The judgment appealed from gives effect to the indemnity intended to be provided.

## II.

*Recovery Allowed Bank Was Altogether Proper*

The contract, as recited in the bond, called for shipment within sixty days from January 19, 1929. The terms of sale provided for a five per cent commission and a two per cent discount for cash in ten days after shipment. Therefore, the net amount realizable had the order been filled and shipment made within the time called for was $3677.45, due on or before March 30, 1929. The Pipe Company went into receiver's hands April 19, 1929, after which date all possibility of performance was at an end. This was approximately twenty days after the due date, but no interest was claimed by the Bank or allowed by the court for that twenty days.

Appellant's statement (brief, p. 31) to the contrary notwithstanding, the Bank does contend, not that it purchased outright the proceeds of the order, but that it took for value an assignment of the whole of such proceeds (Ex. "B", Tr. p. 14) as collateral, first, for the advances then made, and secondarily, under the general loan and collateral agreement for any other indebtedness owing it by the Pipe Company. Further, it is the Bank's contention that inasmuch as the Pipe Company's proven indebtedness to it far exceeds the amount of such invoice, the measure of its damages is the net amount which would have been realizable had the Pipe Company carried out and fulfilled the order and thereby rendered the proceeds of that order collectible, together with interest at the legal rate from the due date of such proceeds. Its damages are, therefore, measured by and include the net proceeds of the invoice, with interest from ten days after the date when shipment should have been made. Damages universally include interest from the due date where money is withheld after payment is due on liquidated demands, and in Washington on unliquidated demands as well if the amount thereof can be ascertained by mere computation. 17 *C. J.*, *Damages*, p. 811; *Parks vs. Elmore*, 59 Wash. 584, 592 and 593. The liability to such interest as damages clearly must have been within the intention and contemplation of the parties and is therefore recoverable as such. 31

*C. J., Indemnity*, 429, 430; *National Bank of Tacoma vs. Aetna Cas. Co.*, 161 Wash. 239, 250.

By the terms of its bond the Surety Company was bound to indemnify the Bank against all its damages, provided the aggregate thereof did not exceed the penal sum of the bond, namely, $4000.00, with interest thereon from the date of demand on the surety. Treating August 4, 1930, when suit was instituted, as the date of demand, the surety's maximum liability under the bond to the date of trial was therefore $4000.00 plus $306.00 interest. The Bank's actual damages as allowed were only $4244.36, which was well within the limit of the surety's liability.

> "As the aggregate liability * * * exceeds the penalty, it (the surety) was properly held for an additional amount equal to interest from the commencement of suit."
>
> *Illinois Surety Co. vs. John Davis Co.*, 244 U. S. 367 at 381; 61 L. ed. 1206 at 1212.

The decision of the Washington court reported in 161 Wash. 239, 296 Pac. 831, is not to the contrary. There the Bank sued for the amount which should have been realizable on the assigned proceeds, with interest, as measuring its damages, but as already pointed out, it elected, for reasons not here material, to go no further with its proof than to show the balance remaining unpaid on the assign-

ment note evidencing the new advance. Calculating interest on that indebtedness according to the terms of said note at seven per cent instead of at six per cent, the legal rate, the total amount proven to be due the Bank, after allowing credit for the partial payment of $974.79, was only $1397.48. As that amount was considerably less than the balance payable on the order, recovery was allowed without any argument over the interest or the rate at which calculable.

If for any reason it should be held that the damages recoverable under the bond must be limited to the amount due on the advance made by the Bank, with interest according to the terms of the note evidencing the same, then the total amount due on November 13, 1931, when the verdict was returned, was $3989.23, being the amount of the advance, $3375.00, with interest at seven per cent from January 21, 1929. Such recovery would be in exact accord with that allowed by the state court, although for reasons already discussed it is submitted that this point was not involved before the state court and its decision is therefore not controlling.

## III.

### *The Bank Is Entitled to Recover the Full Amount of Its Actual Damages*

Appellant's argument that appellee's recovery should be limited to one-half the penalty of the bond with interest is predicated upon the proposition that the bond "was a several obligation running to the Lumber Company and the Bank," coupled with the admission that the legal interest and cause of action of the Lumber Company (if any) was separate and distinct from that of the Bank.

The same contention before the Supreme Court of Washington was adversely ruled on as follows:

> "Appellant also insists that the surety could not be held liable for a double penalty as it would be if the bond be construed as the trial court interpreted, * * *. Again we consider that appellant having furnished the bond itself, its language is to be most strongly construed against it and that it was understood and intended that the liability to each of the obligees was joint *or* several and not joint *and* several; and that there would be a different measure of liability to either of the obligees.
>
> "Thus for non-fulfillment of the order to the Lumber Company the Pipe Company would be liable for damages measured by the difference

between the value of the goods at the date of the breach of the bond and their value to the Lumber Company had they been constructed and delivered within the time agreed.

"The Lumber Company was not damaged by the same matter which would damage respondent. Respondent was damaged by the non-payment of its debt * * *. Where the legal interest and cause of action of the obligees is several and not joint, the covenant is taken to be several and each of the obligees may bring a cause of action for its particular damages, 4 *R. C. L.* p. 65. * * *

"* * * There can be no question but that the bond before us was intended to apply to losses or damages or liabilities of different character as to each of the indemnitees. It is also manifest that it was so intended by the principal and surety."

161 Wash. 239 at pp. 249, 250.

Appellant's whole argument on this point is based on its opening statement on page 14 that the bond runs to two obligees. Accepting that statement temporarily for the purposes of argument only, it is beyond question that the rights of the Lumber Company and the Bank, as obligees, being several, either might sue separately on the bond. (See Proposition IV (b), pp. 25-26, supra.) The

extent of recovery allowed a several obligee suing separately is determined by:

(a) The express definitions and limitations of the bond. *Farni vs. Tesson*, 1 *Black*, 209, 17 L. ed. 67. There are no such limitations here.

(b) The fact that although the interests of the obligees are separate, yet the interests of all are equal. In such event only a proportional recovery may be had by any one obligee. Such is the case of the interest of one or several minor wards in the bond of their common guardian and is the rule given effect in *Title Guaranty & Surety Co. vs. Foster*, 203 Pac. 231, and other cases cited by appellant (brief p. 36). There is no equality of interest here. (Cf. 161 Wash. p. 249).

(c) The fact that the interests of the obligees are separate and several but unequal and not expressly defined. In such event each may recover his particular damages.

*St. Louis, Alton & Rock Island R. R. Co. vs. Cultis*, 33 Ill. 188;

*Dashley vs. Daniel*, 202 Fed. 427 (C. C. A. 9th);

9 *C. J. Bonds*, p. 94.

The present case falls in the third group or category. The evidence establishes beyond doubt that the rights of the Twin Harbors Lumber Com-

pany, if in fact it were an obligee under the bond, were not equal to and wholly different in character from those of the Bank. Its damages, if any, were to be measured by an entirely different rule than those of the Bank, as pointed out by the Supreme Court of Washington in the citations already made. But more important is the fact that because the Lumber Company had no such contract as is recited in the bond, it could not sustain damages because the shipment of that material was not made to it.

Moreover, appellant here has neither established a basis in the facts of the case nor any standing before this court to raise the point sought to be made. Under the language of the bond it might run either to both the Lumber Company and the Bank or to the Lumber Company alone or to the Bank alone. Who was the actual obligee thereunder was a question of fact for determination from the evidence. That evidence disclosed that there was no delivery of the bond, actual or constructive, to the Lumber Company and that it was not intended to be delivered to the Lumber Company. The Lumber Company was, therefore, not, in fact an obligee under the bond. Delivery of a bond is essential to put it in effect or to create rights in one purporting to be named as obligee therein. 9 *C. J.*, *Bonds*, Sec. 24, p. 16; 4 *R. C. L.*, *Bonds*, Sec. 5, p. 48.

No objection was made by the Surety Company by motion, demurrer or answer to the non-joinder of the Lumber Company. Its non-joinder involves the question of defective parties which, under the practice in the State of Washington if not raised by demurrer or answer, is waived and cannot be urged on appeal.

*Hannegan vs. Roth*, 12 Wash. 695;

*Budlong vs. Budlong*, 48 Wash. 645;

*Buckles vs. Reynolds*, 58 Wash. 485;

*Hansen vs. Hansen*, 110 Wash. 276;

*Chung vs. Fong Co.*, 130 Wash. 154.

See also:

*U. S. F. & G. Co. vs. Parker*, 121 Pac. 531.

Upon the trial, without objection and without the point now attempted to be made being in any way raised or reserved by the Surety Company, it was conclusively established that the Lumber Company had sustained no damages. Accordingly, the case now before this court is precisely as though the Bank had alleged in its complaint that the Twin Harbors Lumber Company was without interest in the bond and that allegation had been either admitted by the Surety Company or proven. As said by Judge Gilbert in rendering the opinion of this court in *Dashley vs. Daniel*, 202 Fed. 427,

"* * * No exception was taken on that ground (i. e., that the want of interest of the Twin Harbors Lumber Company was not alleged) in the court below and no instruction thereon was requested, and no assignment of error presents that ground for reversing the judgment. We may assume, therefore, that although the plaintiffs in error made a general denial of the allegation that Ruhl had sustained no damages and had acquired no cause of action under the bond, it nevertheless assented to the truth of that allegation and had no meritorious ground for asserting that it was prejudiced by the omission to bring Ruhl into court."

WHEREFORE, it is respectfully submitted that the judgment of the trial court should be in all respects affirmed.

Respectfully submitted,

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